Office - Supreme Court, U.S.
FILED
AUG 18 1982
CLERK

Nos. 81-2147 and 81-2188

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL.

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

DIRK D. SNEL
THOMAS H. PACHECO
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the disclaimers of State jurisdiction over Indian lands contained in the Enabling Acts for Arizona and Montana and in their Constitutions disable the courts of those States from adjudicating Indian reserved water rights.

2. Whether, assuming both the State and federal courts enjoy concurrent jurisdiction in the premises, a federal court whose jurisdiction is timely invoked by the United States or the affected Tribe for the sole purpose of quantifying Indian Reservation water rights should dismiss such an action in order to permit the State court to determine those rights in a general stream adjudication.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes and state constitutional provisions involved	2
Statement	2
A. The Arizona cases	3
1. *San Carlos Apache Tribe* v. *Arizona*	3
2. *Navajo Nation* v. *United States*	4
B. The Montana cases	5
Discussion	7
A. The Disclaimer Issue	9
B. Considerations of Wise Judicial Administration	16
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 373 U.S. 546	18
Bryan v. *Itasca County*, 426 U.S. 373	19, 20
Colorado River Water Conservation District v. *United States*, 424 U.S. 800	*passim*
Donnelly v. *United States*, 228 U.S. 243	10, 14
Draper v. *United States*, 164 U.S. 240	10
Dugan v. *Rank*, 372 U.S. 609	6
Fisher v. *District Court*, 424 U.S. 382	10, 21
Heckman v. *United States*, 224 U.S. 413	21
Jicarilla Apache Tribe v. *United States*, 601 F.2d 1116, cert. denied, 444 U.S. 995	7, 9
Kake Village v. *Egan*, 369 U.S. 60	10, 12
Kansas Indians, The, 72 U.S. (5 Wall.) 737	14, 19
Kennerly v. *District Court of Montana*, 400 U.S. 423	11, 21
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145	10

Cases—Continued Page

McClanahan v. *Arizona State Tax Commission*, 411 U.S. 164 ..... 10, 11, 19, 21
Minnesota v. *United States*, 305 U.S. 382 ..... 11, 21
Moe v. *Salish & Kootenai Tribes*, 425 U.S. 463 ..... 21, 22
Morton v. *Mancari*, 417 U.S. 535 11
Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 20
Ramah Navajo School Board v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982) 19, 20
Rice v. *Olson*, 324 U.S. 786 19
United States v. *Chavez*, 290 U.S. 357 10
United States v. *Clarke*, 445 U.S. 253 21
United States v. *District Court for Eagle County*, 401 U.S. 520 15
United States v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 108 U.S. 491 14
United States v. *Kagama*, 118 U.S. 375 ..... 14, 19
United States v. *McBratney*, 104 U.S. 621 14
United States v. *Rickert*, 188 U.S. 432 21
United States v. *Sandoval*, 231 U.S. 28 10
United States v. *Sutton*, 215 U.S. 291 10
Warren Trading Post v. *Arizona State Tax Commission*, 380 U.S. 685 10
Washington v. *Yakima Indian Nation*, 439 U.S. 463 ..... 10, 11
Williams v. *Lee*, 358 U.S. 217 ..... 19, 21
Williams v. *United States*, 327 U.S. 711 10
Wilson v. *Omaha Indian Tribe*, 442 U.S. 653 20
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 19

Constitution, treaties, statutes and regulations:

Arizona Const., Art. XX, § 4 ..... 2, 3
Idaho Const., Art. 21, § 19 12
Montana Const. of 1889, Ordinance No. I 2
Montana Const. of 1972, Art. I 2
Wyoming Const., art. 21, § 26 12
Treaty with the Apaches of July 1, 1852, Art. 1, 10 Stat. 979 20
Treaty with the Cheyenne and Arapahoe of Oct. 28, 1867, Art. VI, 15 Stat. 593 20

Constitution, treaties, statutes and regulations—Continued

	Page
Treaty with the Navajos of Sept. 9, 1849, Art. I, 9 Stat. 974	19
Treaty with the Northern Cheyenne and Northern Arapahoe of May 10, 1868, Art. III, 15 Stat. 655	20
Treaty with the Shawnees of 1831, 7 Stat. 357	13
Act of July 10, 1952 (McCarran Amendment), ch. 651, 66 Stat. 560, 43 U.S.C. 666	2, 6, 7, 8, 11, 12, 15, 16, 17, 22
Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 *et seq.* (Pub. L. No. 280)	8, 12, 14, 15
Section 6, 67 Stat. 590	11
Enabling Act of Feb. 22, 1889, ch. 180, 25 Stat. 676	2, 7, 12
Enabling Act of July 3, 1890, ch. 656, 26 Stat. 215	12
Enabling Act of July 10, 1890, ch. 664, 26 Stat. 222	12
Enabling Act of July 16, 1894, ch. 138, 28 Stat. 108	12
Enabling Act of July 26, 1906, ch. 3335, 34 Stat. 270	12
Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557 *et seq.*:	
36 Stat. 557	3, 9
36 Stat. 558-559	9
36 Stat. 569	2, 3
36 Stat. 569-570	9
Enabling Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, as amended by Pub. L. No. 86-70, 73 Stat. 141	12
Indian Reorganization Act, 25 U.S.C. 461 *et seq.*	21
Indian Self-Determination Act of 1975, 25 U.S.C. 450 *et seq.*	20
Nonintercourse Act of 1790, ch. 33, 1 Stat. 137	20
25 U.S.C. 357	21
25 U.S.C. 1322(b)	8, 12, 20
25 U.S.C. 1324	8, 11
28 U.S.C. (Supp. IV) 1331	11
28 U.S.C. 1345	11

Constitution, treaties, statutes and regulations—Continued — Page

28 U.S.C. 1360(b) 8, 12, 20
28 U.S.C. 1362 ..... 21, 23
5 Stat. 11 13
5 Stat. 235 13
9 Stat. 323 13
12 Stat. 127 13
Ariz. Rev. Stat. Ann.:
§§ 45-231 *et seq.* (1956) 3
§§ 45-251 *et seq.* (Cum. Supp. 1981) 3
1979 Mont. Laws ch. 697, § 1-38 6

Miscellaneous:

Final Report of the National Water Commission (1973) 22
Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535 (1975) 14
H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966) 22
S. Rep. No. 1507, 89th Cong., 2d Sess. 1966) 22
U.S. Dep't of Commerce, *Federal and State Indian Reservations* (1974) 13
U.S. Dep't of Commerce, *Statistical Abstract of the United States 1981* (102 ed. 1982) 12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2147

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL.

No. 81-2188

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *San Carlos Apache Tribe* v. *Arizona* (81-2147 Pet. App. A) is reported at 668 F.2d 1093; that court's opinion in *Navajo Nation* v. *United States* (81-2147 Pet. App. B) is reported at 668 F.2d 1100; and the opinion of the same court in *Northern Cheyenne Tribe* v. *Adsit* (81-2188 Pet. App. 26-52) is reported at 668 F.2d 1080. The opinion of the district court in *San Carlos Apache Tribe* v. *Arizona* (81-2147 Pet. App. E) is reported at 484 F. Supp. 778 (D. Ariz. 1980). The opinion of the district court in

Navajo Nation v. *United States* (81-2147 Pet. App. D) is unreported. The opinion of the district court in *Northern Cheyenne Tribe* v. *Adsit* (81-2188 Pet. App. 53-61) is reported at 484 F. Supp. 31 (D. Mont. 1979).

JURISDICTION

The judgment of the court of appeals in *San Carlos Apache Tribe* v. *Arizona*, was entered on February 23, 1982, and was entered in *Navajo Nation* v. *United States* on February 24, 1982. The petition for a writ of certiorari in No. 81-2147, covering both cases, was filed on May 12, 1982. The judgment of the court of appeals in *Northern Cheyenne Tribe* v. *Adsit* was entered on February 22, 1982. The petition for a writ of certiorari in No. 81-2188 was filed on May 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

Section 20 of the Enabling Act for Arizona and New Mexico of June 20, 1910, ch. 310, 36 Stat. 569, and Article XX, Section 4, of the Arizona Constitution are reproduced in relevant part at 81-2147 Pet. 2-3. Section 4 of the Enabling Act for Montana (and other States) of Feb. 22, 1889, ch. 180, 25 Stat. 676-677, and Ordinance No. I of the Montana Constitution of 1889 and Article I of the Montana Constitution of 1972 are reproduced in relevant part at 81-2188 Pet. 3-4. The McCarran Amendment, Act of July 10, 1952, ch. 651, 66 Stat 560, 43 U.S.C. 666, is reproduced at 81-2147 Pet. 3-4 and 81-2188 Pet. 4-5.

STATEMENT

This memorandum addresses two petitions for certiorari: No. 81-2147, in which review is sought of two judgments of the court of appeals covering a number of Arizona cases; and No. 81-2188, seeking review of the single judgment of the same court disposing of several Montana cases.

A. The Arizona Cases

1. *San Carlos Apache Tribe* v. *Arizona*

On March 7, 1979, six Indian Tribes filed suit in the United States District Court for the District of Arizona seeking to prevent the adjudication of their rights to the water of the Salt, Verde and Gila River systems in State proceedings.[1] Some of the actions sought removal to the district court.[2] The other suits prayed for (1) a declaratory judgment that Arizona State courts lack jurisdiction to determine Indian water rights because of disclaimers of State jurisdiction over Indian lands contained in the Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, 569, and the State Constitution, Ariz. Const. Art. XX, § 4, and (2) an injunction against further State court proceedings.[3] A month later, the Fort McDowell Mohave-Apache Indian Community and the San Carlos Apache Tribe filed actions asking the federal court to determine their rights in the Verde and Salt Rivers, respectively.[4]

The district court remanded the removed actions to State court and dismissed the other suits, holding, *inter alia*, that the disclaimer provisions did not preclude State court jurisdiction over Indian water rights. The

---

[1] The State proceedings were initiated pursuant to Arizona's water rights determination procedure. See Ariz. Rev. Stat. Ann. §§ 45-231 *et seq.* (1956), Ariz. Rev. Stat. Ann. §§ 45-251 *et seq.* (Cum. Supp. 1981).

[2] *White Mountain Apache Tribe Petition for Removal*, No. CIV 79-182 PHX VAC; *Gila River Indian Community Petition for Removal*, No. CIV 79-183 PHX VAC; *Salt River Pima-Maricopa Indian Community Petition for Removal*, No. CIV 79-184 PHX VAC.

[3] *Salt River Pima-Maricopa Indian Community* v. *Arizona*, No. CIV 79-185 PHX VAC; *San Carlos Apache Tribe* v. *Arizona*, No. CIV 79-186 PHX VAC (removal sought in the alternative); *Payson Community of Yavapai-Apache Indians* v. *Arizona*, No. CIV 79-187 PCT VAC (removal sought in the alternative).

[4] *Fort McDowell Mohave-Apache Indian Community* v. *Salt River Valley Water Users' Association*, No. CIV 79-267 PHX VAC (complaint filed Apr. 13, 1979); *San Carlos Apache Tribe* v. *Arizona*, No. CIV 79-269 PHX CAM (complaint filed Apr. 16, 1979).

Tribes appealed from this decision, except for the remand of the removed actions. The appeals were consolidated in the court of appeals and were argued on July 15, 1981.

The same panel of judges which heard argument in the Arizona appeals (both *San Carlos Apache Tribe* v. *Arizona* and *Navajo Nation* v. *United States*) also heard argument on the same day in consolidated appeals from Montana, *Northern Cheyenne Tribe* v. *Adsit*, involving similar issues and now the subject of the petition for a writ of certiorari in *Montana* v. *Northern Cheyenne Tribe*, No. 81-2188.

On February 23, 1982, the court of appeals rendered its decision in *San Carlos Apache Tribe* v. *Arizona*, reversing and remanding the decision of the district court. The Ninth Circuit held (81-2147 Pet. App. A-8 to A-9, A-11) that the disclaimer provisions in Arizona's Enabling Act and Constitution barred the State from asserting jurisdiction over Indian water rights. In reaching this result, the court adopted in full the reasoning on this point of its decision the day before in *Northern Cheyenne Tribe* v. *Adsit* (*id.* at C-3 to C-11). The court stated (*id.* at A-9) that, "[a]s in the *Northern Cheyenne* case, we find it necessary to remand for a determination of whether Arizona has obtained jurisdiction over the Indians pursuant to Public Law 280." The court noted (*id.* at A-10) that its holding on the disclaimer issue made it unnecessary for the court to decide whether dismissal under the doctrine of "wise judicial administration" [5] would have been proper if Arizona had not disclaimed jurisdiction over Indian lands.

2. *Navajo Nation* v. *United States*

On April 17, 1979, the Navajo Tribe filed a complaint in the United States District Court for the District of Arizona, which as subsequently amended, requested a

---

[5] See *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817-820 (1976) (*"Akin"*).

determination of the Navajo's rights in the Little Colorado River.[6] The district court stayed all proceedings in this action pending a State court general stream adjudication for the Little Colorado (81-2147 Pet. App. D-1). The Navajo Nation appealed. The Ninth Circuit reversed and remanded by decision of February 24, 1982 (*id.* at B-1), stating (*id.* at B-4) that its holding in *San Carlos Apache Tribe* v. *Arizona* that Arizona has disclaimed jurisdiction over Indian water rights compelled reversal of the district court's order. Because of this ruling on the disclaimer question, the court did not find it necessary to address other issues, including the United States' claim that sovereign immunity barred the Navajos from suing the United States in this action (81-2147 Pet. App. B-4).[7]

The United States was not a party to the *San Carlos Apache Tribe* group of cases, although it participated in the district court proceedings as *amicus curiae* in support of the Tribes. The United States did not appear in the court of appeals proceedings concerning that group of cases. The United States was named as a defendant in the *Navajo Nation* case and participated in the court of appeals as appellee in that case.

B. The Montana Cases

On January 30, 1975, the Northern Cheyenne Tribe brought an action[8] in the United States District Court for the District of Montana seeking an adjudication of its rights in certain streams in that State. Shortly thereafter, in the same year, the United States filed two

---

[6] *Navajo Nation* v. *United States*, No. 79-276 PCT VAC (complaint filed Apr. 17, 1979).

[7] Judge Merrill dissented in the *San Carlos Apache Tribe* and *Navajo Nation* decisions (81-2147 Pet. App. A-11, B4), as he did in *Northern Cheyenne Tribe* (*id.* at C-18).

[8] *Northern Cheyenne Tribe* v. *Tongue River Water Users Assn., et al.*, No. CIV-75-6-BLG.

suits [9] in the same district court seeking a determination of water rights on behalf of several Indian Tribes and on its own behalf. In 1979, the United States filed four other actions [10] in the same court also seeking a determination of Indian and non-Indian federally-owned rights in other Montana streams. All six of the actions filed by the United States requested a determination of the rights of all claimants on the named streams.[11]

Almost five years after the filing of the Northern Cheyenne Tribe's suit, the district court dismissed all of the actions in favor of State adjudicatory proceedings,[12] relying on the "wise judicial administration" doctrine set out in *Akin* (see 81-2188 Pet. App. 60).

The United States and various Tribes [13] appealed. As we have noted, the same panel of the court of appeals which heard argument on July 15, 1981, in the consolidated Montana appeals also heard argument on the same

---

[9] *United States* v. *Tongue River Water Users Assn., et al.*, No. CV-75-20-BLG (filed Mar. 7, 1975); *United States* v. *Big Horn Low Line Canal, et al.*, No. CV-75-34-BLG (filed Apr. 17, 1975).

[10] *United States* v. *Aasheim, et al.*, No. CV-79-40-BLG; *United States* v. *Aageson, et al.*, No. CV-79-21-GF; *United States* v. *AMS Ranch, Inc., et al.*, No. CV-79-22-GF; *United States* v. *Abell, et al.*, No. CV-79-33-M (all filed on Apr. 5, 1979).

[11] The action brought by the Northern Cheyenne Tribe was consolidated with *United States* v. *Tongue River Water Users Assn., et al., supra.*

[12] See 1979 Mont. Laws ch. 697, §§ 1-38 ("Senate Bill 76") (81-2188 Pet. App. 102). Montana joined the United States as a defendant in its water rights proceedings under the purported authority of the McCarran Amendment, 43 U.S.C. 666, which provides that the United States may be sued in any general water rights adjudication, in federal or State court, where it is a necessary party. See *Dugan* v. *Rank*, 372 U.S. 609, 618 (1963).

[13] Besides the Northern Cheyenne Tribe, other Tribes participated in the district court proceedings; these Tribes intervened as plaintiffs in the district court, or as appellants in the court of appeals, or sought permission to so intervene.

day in *San Carlos Apache Tribe* v. *Arizona* and *Navajo Nation* v. *United States, supra.*

On February 22, 1982, the court of appeals issued its decision (81-2188 Pet. App. 26). The court determined (*id.* at 31) that the McCarran Amendment, 43 U.S.C. 666, had not repealed the disclaimer of State jurisdiction over Indian lands contained in Montana's Enabling Act and Constitution. Without finally deciding the point, the court found no indication that Montana had otherwise validly repealed the disclaimer (81-2188 Pet. App. 31-38). The court ultimately held (*id.* at 38-39) that even if it were determined that Montana had effectively assumed concurrent jurisdiction, the district court's ruling must be vacated because the doctrine of "wise judicial administration" relied on in *Akin* did not support dismissal. Accordingly, the court of appeals reversed, concluding that the governing factors "favor retention of federal jurisdiction" (*id.* at 45).[14]

DISCUSSION

In our view, petitioners have made a strong showing that the disclaimer issue decided by the court below merits review here. The ruling is in direct conflict with the holding of the Tenth Circuit in *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116, cert. denied, 444 U.S. 995 (1979), and is arguably inconsistent with this Court's decision in *Colorado River Water Conservation District* v. *United States* (*"Akin"*), 424 U.S. 800 (1976). Since there are at least eleven States with similar disclaimers of jurisdiction over Indian property rights and they embrace the bulk of Indian Reservation acreage (see pages 12-13, *infra*), the question is plainly one of recurring importance that ought to be resolved by this Court. Accordingly, we urge the granting of the petition for certiorari in No. 81-2147 so far as it challenges the two

[14] Judge Merrill dissented (81-2188 Pet. App. 46, 48) on both the disclaimer and "wise judicial administration" issues.

judgments of the court of appeals which explicitly rest solely on a determination of that issue. See 81-2147 Pet. App. A-10, B-4.[15]

At the same time, we suggest the Court should clarify its ruling in *Akin* that considerations of "wise judicial administration" sometimes counsel a federal court to dismiss the action before it in favor of a general stream adjudication pending in the State courts. See 424 U.S. at 817-821. Experience has shown that the Court's teaching on this score has not been fully understood in all quarters and that further guidance is appropriate. Although the court below did not rest its decision in the Arizona cases on that ground (81-2147 Pet. App. A-10), the issue urgently calls for clarification and we submit the Court properly may take the opportunity to establish the guiding standard. Moreover, our submission on this point would supply an alternative basis for affirmance. We therefore join petitioners in No. 81-2147 in urging that the writ be granted as to both questions presented.

We likewise urge the grant of certiorari in No. 81-2188, the petition challenging the judgment of the same

---

[15] We share petitioners' view (81-2147 Pet. 11, 19, 20 and n.22) that the court of appeals inappropriately remanded the cases "for a determination of whether Arizona has obtained jurisdiction over the Indians pursuant to Public Law 280." *Id.* at A-9. See, also, *id.* at A-11, B-4. Like all other parties, we read Public Law 280 (Act. of Aug. 15, 1953, ch. 505, 67 Stat. 588 *et seq.*) as expressly exempting Indian water rights from the optional assumption of jurisdiction pursuant to that statute. 25 U.S.C. 1322(b); 28 U.S.C. 1360(b). See *Akin*, *supra*, 424 U.S. at 812-813 n.20. If the Indian disclaimer provision of the Arizona Enabling Act is a bar to the adjudication of water rights by the State courts and the McCarran Amendment did not remove it, we do not appreciate how Arizona legislation alone could override that federal law impediment. On the other hand, if the Enabling Act disclaimer is inapplicable or was set aside by the Amendment, there is no basis for requiring Arizona to enact special legislation to overcome the State constitutional disclaimer. That condition, we believe, applies only to State assumption of jurisdiction under Public Law 280, which is not invoked here. See 25 U.S.C. 1324.

court in the Montana cases. Although this is not the ultimate basis for disposition, the opinion fully addresses the "disclaimer" issue (81-2188 Pet. App. 28-38). At all events, the outright reversal of the judgment of dismissal (*id.* at 45, 46) rests squarely on a holding that considerations of "wise judicial administration" did not justify dismissal of the federal actions (*id.* at 38-45) and the decision accordingly presents a clear occasion for this Court to determine whether the so-called "*Akin* factors" were correctly applied and to clarify the governing standard.

A. The Disclaimer Issue

1. Starting with the holding of *Akin* that the McCarran Amendment generally grants State courts concurrent jurisdiction to adjudicate Indian reserved water rights, the question remains whether *Akin* should be extended even to States which expressly disclaimed jurisdiction over Indian property rights, including Arizona and Montana. That was the issue resolved affirmatively by the Tenth Circuit in *Jicarilla Apache Tribe*, *supra*, and in the negative by the Ninth Circuit in the decisions now pending before this Court.[16]

a. The court below was persuaded that unrepealed express disclaimers of jurisdiction over Indian property in the Enabling Acts for the admission of Arizona and Montana and in the Constitutions of these States critically distinguished the present cases from *Akin*, involving Colorado where there is no comparable impediment. On its face, the proposition is not without force.

Indeed, it has been the general understanding, shared by this Court and the Congress, that the familiar disclaimer clauses of Enabling Acts generally insulate

[16] To be sure, the Tenth Circuit was considering the issue in the context of New Mexico, rather than Arizona and Montana. But, as all parties recognize, the Enabling Act disclaimer clauses are in all relevant respects identical. Indeed, Arizona and New Mexico were admitted to the Union pursuant to the same Enabling Act. See 36 Stat. 557, 558-559, 569-570.

Indian Reservation affairs from the jurisdiction of State authorities. See, *e.g.*, *United States* v. *Sutton*, 215 U.S. 291, 295-296 (1909) (Washington); *United States* v. *Sandoval*, 231 U.S. 28, 36-38, 40 (1913) (New Mexico); *United States* v. *Chavez*, 290 U.S. 357, 360, 365 (1933) (New Mexico); *Williams* v. *United States*, 327 U.S. 711, 714-715 n.10 (1946) (Arizona); *Williams* v. *Lee*, 358 U.S. 217, 222-223 & n.10 (1959) (Arizona); *Warren Trading Post* v. *Arizona State Tax Commission*, 380 U.S. 685, 687 n.3 (1965) (Arizona); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (1973) (New Mexico); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 175, 178 (1973) (Arizona); *Fisher* v. *District Court*, 424 U.S. 382, 386 and n.8 (1976) (Montana).[17] Plainly, that was the congressional view when enacting Public Law 280 in 1953, it being thought necessary to remove these Enabling Act "impediments" before the courts of the so-called "disclaimer States" could assume criminal or civil jurisdiction within "Indian country." See *Washington* v.

---

[17] *Draper* v. *United States*, 164 U.S. 240 (1896), is not to the contrary. That decision merely recognizes that a disclaimer does not wholly disable the State from asserting jurisdiction over *non-Indian* activity within a Reservation, such as the murder of one non-Indian by another. See *Donnelly* v. *United States*, 228 U.S. 243, 271-272 (1913), and *Williams* v. *United States*, 327 U.S. 711, 714 (1946), explaining the limited holding of *Draper*. Nor are these cases ruled by the dictum of *Kake Village* v. *Egan*, 369 U.S. 60, 68 (1962), that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction." That was said in the context of State regulation of *off-Reservation* Indian *aboriginal* fishing rights. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 171-172, 176 n.15 (1973). What is more, the special legislative history of the Alaska Statehood Act (see *Kake Village* v. *Egan*, *supra*, 369 U.S. at 69-71) is inapplicable to the disclaimer clauses written at the turn of the century which intended that Indian Reservation property rights "remain within the *exclusive* control and jurisdiction of the United States." See *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 488 n.31 (1979), quoting a House Report on the Enabling Act for the admission of Washington, North Dakota, South Dakota and Montana (emphasis added).

Yakima Indian Nation, 439 U.S. 463, 470-474, 479-482, 490-493 (1979); *Kennerly v. District Court of Montana*, 400 U.S. 423, 427 (1971); *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 177-178 & nn. 17 and 19, 180. Thus, it is a little late in the day to be suggesting that both the Congress and this Court were making much ado about nothing because the disclaimers were not "jurisdictional."

b. The question remains, however, whether the McCarran Amendment repealed or waived the Enabling Act disclaimers. Applying the usual rules of construction, a negative answer would seem indicated. In *Akin* itself, the Court declined to find that the McCarran Amendment had impliedly repealed Sections 1331 and 1345 of the Judicial Code, 28 U.S.C. (& Supp. IV) 1331 and 1345, so far as they conferred jurisdiction on the federal courts in the premises. 424 U.S. at 807-809. The same reluctance to assume repeal by implication argues for a like result here. Especially so, one supposes, where vital Indian rights are at stake. See *Morton* v. *Mancari*, 417 U.S. 535, 549-551 (1974). After all, on its face, the McCarran Amendment is no more than a waiver of sovereign immunity; it does not in terms confer any new subject-matter jurisdiction upon State courts or remove any other impediment to the exercise of such jurisdiction over Indian property rights. Cf. *Minnesota* v. *United States*, 305 U.S. 382 (1939).

What is more, it is difficult to reconcile an implied repeal in this context with the fact that, only a year after the McCarran Amendment, Congress deemed it necessary in Public Law 280 to enact a special provision for "disclaimer" States, expressly waiving the federal impediment and requiring the States to take positive steps to remove State constitutional obstacles. Act of Aug. 15, 1953, ch. 505, Section 6, 67 Stat. 590; 25 U.S.C. 1324. Is it possible to assume that in the previous session, the Congress treated the disclaimer clauses so lightly that they were cast aside without even an honorable mention in the statute or its legislative history? And, finally, it is

not easy to explain the explicit reservation of federal jurisdiction over Indian water rights in Public Law 280 if that jurisdiction had already been ceded in large measure a year earlier. See 25 U.S.C. 1322(b); 28 U.S.C. 1360(b). Had everyone in 1953 so soon forgotten that the water had already gone over the dam? At least where there were express disclaimers, that would seem to be reading too much into the McCarran Amendment.

2. Thus, if we pursue the matter no further, the ruling below would seem to be correct. But, at the end of the day, there is intolerable tension between the rule of *Akin* for non-disclaimer States and the present decision announcing a different rule for disclaimer States.

a. The fact is that, in the West, where most Indians live and water is scarce, disclaimer provisions are the norm, not the exception. Of the twelve States west of the 100th Meridian (including Alaska but not Hawaii), all but four—California, Oregon, Nevada and Colorado—are disclaimer States. So are three other States with substantial Indian populations: North Dakota, South Dakota and Oklahoma.[18] Almost half the Indians live in disclaimer States. See U.S. Dep't of Commerce, *Statistical Abstract of the United States 1981*, Table 36, at 32 (102 ed. 1982). And, perhaps most significant because

---

[18] In the order of their admission to the Union, the eleven disclaimer States are: North Dakota, South Dakota, Montana and Washington (all covered by the Enabling Act of Feb. 22, 1889, ch. 180, 25 Stat. 677), Idaho (Enabling Act of July 3, 1890, ch. 656, 26 Stat. 215), Wyoming (Enabling Act of July 10, 1890, ch. 664, 26 Stat. 222), Utah (Enabling Act of July 16, 1894, ch. 138, 28 Stat. 108), Oklahoma (Enabling Act of June 26, 1906, ch. 3335, 34 Stat. 270), New Mexico (Enabling Act of June 20, 1910, ch. 310, 36 Stat. 558-559), Arizona (Enabling Act of June 20, 1910, ch. 310, 36 Stat. 569-570), and Alaska (Enabling Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, as amended by Pub. L. No. 86-70, 73 Stat. 141). In the case of Idaho and Wyoming, the Indian disclaimers are to be found only in their respective Constitutions (Idaho Const., Art. 21, § 19; Wyoming Const., Art. 21, § 26), but, presumably, those provisions, submitted to Congress for approval before admission, were effectively required as a condition of statehood. See *Kake Village* v. *Egan*, *supra*, 369 U.S. at 68. For the special case of Kansas, of little practical importance today, see note 19, *infra*.

Indian water rights are usually measured in accordance with irrigable acreage rather than population, more than nine-tenths of Indian land (excluding Alaska)—including the 21 largest Indian Reservations—lie in disclaimer States. See *id.*, Table 389, at 228; U.S. Dep't of Commerce, *Federal and State Indian Reservations* (1974). The upshot is that confining the *Akin* ruling to the non-disclaimer States is to relegate it to relative insignificance. To paraphrase the words of that decision (424 U.S. at 811), it is difficult to avoid the conclusion that "a construction of the [unanimous *Akin* decision] excluding [Indian water rights in disclaimer States] from its coverage would enervate the [decision's] objective."

b. There is, moreover, no apparent justification for different treatment of disclaimer States and other States with Indian Reservations. So far as we can discern, Congress made no policy decision to retain exclusive federal jurisdiction of Indian property interests in some States, but not in others. The historical fact is that, from 1889 onwards, every newly admitted State was required to disclaim jurisdiction over Indian Reservations.[19] Apparently,

---

[19] Although the first disclaimer clause in the familiar language involved here is to be found in the 1889 Enabling Act for the admission of Washington, North Dakota, South Dakota and Montana, there were precedents of some relevance. In several Acts of Congress establishing territorial governments, Congress inserted a proviso preserving "the rights of person or property now appertaining to any Indians," including treaty rights, and reserving "the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights." See 5 Stat. 11 (1836, Wisconsin Territory); 5 Stat. 235 (1838, Iowa Territory); 9 Stat. 323 (1848, Oregon Territory). More significant, perhaps, is the Act of Admission for the State of Kansas in 1861, which, in addition to preserving "the rights of person or property now pertaining to the Indians," wholly exempted from State jurisdiction, as "no part of the State," "any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory." 12 Stat. 127. It is not clear, however, whether the latter provision, referring to the Treaty with the Shawnees of 1831 (7 Stat. 357), ever had any bite in light of

Congress was reacting to the then recent decision in *United States* v. *McBratney*, 104 U.S. 621 (1882), where the Court, condoning the exercise of State authority within an Indian Reservation, pointedly noted that jurisdiction over Indian lands had not been excluded when the State of Colorado was admitted and seemed to open the door to general State jurisdiction. *Id.* at 623-624. See Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 570 (1975). In short, the disclaimer provisions appear to be an express confirmation of the general rule, not the fashioning of a new principle. And, indeed, the Court itself, both before and after the first disclaimer clauses were written in 1889, made clear that absence of an express disclaimer did not oust federal jurisdiction or subject Indian land to State authority. See, *e.g.*, *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), 108 U.S. 491 (1883) (Minnesota); *United States* v. *LeBris*, 121 U.S. 278 (1887) (Minnesota); *United States* v. *Kagama*, 118 U.S. 375 (1886) (California); *Donnelly* v. *United States*, 228 U.S. 243 (1913) (California).

c. Accordingly, we believe it would be wrong to follow a different procedural rule in the disclaimer States on the ground that Congress meant to treat them with special distrust in Indian matters. That would present at least an arguable question under the Equal Footing Doctrine.[20]

---

a later treaty of 1854. When the Court came to decide the case of *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866), this disclaimer was noted (*id.* at 739, 740-741), but the Court rested its result on the more general recognition of Indian property in the Act of Admission and the protective jurisdiction of the United States. *Id.* at 755-757.

[20] The problem would be substantially alleviated if, as the court below apparently believed, Public Law 280 authorized the disclaimer States (at least from 1953 until tribal consent was required in 1968) to place themselves on an "equal footing" by removing the disclaimer impediment. But, as we have noted (see note 15, *supra*), all parties agree that Public Law 280 offers no such option with respect to Indian water rights. On the other hand, it may not be

We are therefore confronted with two alternatives: (1) to read the Enabling Act disclaimers as reflecting a *general* Congressional policy to oust State jurisdiction over Indian Reservation property interests, including water rights, and to conclude that this rule, as applicable to Reservation water, was not effectively revoked by the McCarran Amendment or by Public Law 280; or (2) to construe the McCarran Amendment as conferring on State courts competence to adjudicate Indian water rights in all States, and, to that extent, impliedly removing the Enabling Act impediments.

It is too late in the day to suggest the first course. Notwithstanding the obstacles just outlined, the most obvious solution to our dilemma is to extend the rule of *Akin* to disclaimer States.

Indeed, once it was determined that the McCarran Amendment reached not only water rights acquired by the United States under State law, but also "reserved" federal water rights (*United States* v. *District Court for Eagle County*, 401 U.S. 520 (1971)), "the logic of those cases" extends to reserved water rights held by the United States on behalf of Indian Reservations wherever located. See *Akin*, *supra*, 424 U.S. at 810. Assuming an underlying policy of the McCarran Amendment to avoid "piecemeal adjudication of water rights in a river system," especially in light of the "highly interdependent" character of competing claims to the water of a single stream system (*id.* at 819), it makes little practical sense to exempt Indian water rights in disclaimer States, where, as it happens, most such rights arise. At least when the jurisdiction of a federal court is not contemporaneously invoked to quantify Indian Reservation rights, the objective of the McCarran Amendment, as declared by this Court, would be defeated if State courts were powerless to perform the task. Thus, the momentum of

---

wrong to read Public Law 280's treatment of Enabling Act disclaimer clauses as an indication that Congress wished to end any special disability attributable to those provisions.

the Court's past decisions carries the day against the disclaimer ruling below.

B. Considerations of Wise Judicial Administration

1. Conceding the concurrent jurisdiction of the State courts in all States does not, however, resolve the question whether a federal court, whose jurisdiction is timely invoked, ought to refuse to proceed. In *Akin*, while stressing "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" and cautioning that only "exceptional" circumstances and "the clearest of justifications" will warrant dismissal of the federal suit (424 U.S. at 817, 818, 819), the Court articulated certain factors that will justify a federal court in declining to entertain an action for the adjudication of Indian Reservation water rights. *Id.* at 818-820. After some experience under this regime, we deem it appropriate to ask the Court to clarify this aspect of the *Akin* decision.

a. In practice, *Akin* has not fulfilled the hope that it would eliminate duplicate litigation and provide a harmonious accommodation of competing interests. On the contrary, because of the supposed importance of the forum in this context, the actual experience since *Akin* has been characterized by an unseemly race to the courthouse, followed by often prolonged and intense jurisdictional skirmishing, pursued both in State and federal courts. As the present cases sufficiently illustrate, the upshot of this procedural maneuvering has been to delay, sometimes for years, the adjudication of competing water claims. And, equally important, there continues to be a substantial waste of judicial resources and an increased tension between the parties and the two court systems.

This situation, we suggest, calls for clarification of the *Akin* rule. On the one hand, in stating that the policy of the McCarran Amendment itself is the most weighty factor arguing for dismissal of a federal court suit in favor of a general stream adjudication in the State

courts (424 U.S. at 819, 820), the decision can be read as mandating dismissal in almost all cases where appropriate State proceedings are timely initiated. On the other hand, some have understood the Court as indicating a contrary presumption because the special circumstances of the cases were noted as relevant factors and the occasions justifying declination of federal jurisdiction were characterized as "exceptional." 424 U.S. at 818. Neither view is foreclosed by the Court's opinion in *Akin* and, quite naturally, litigants and lower courts have disagreed as to how to apply the teaching of the decision. The present cases offer the Court an opportunity to settle the debate.

b. We submit the rule everywhere should be that, regardless whether the Tribe or the United States is the moving party, a federal court whose jurisdiction is timely invoked to determine the existence and extent of Indian Reservation water rights should proceed to decide that discrete federal question so long as this does not materially delay the adjudication of the overall controversy. If there were no timely filing of a federal action to determine Indian water rights, the State court would be free to proceed to decision of this issue as part of the total adjudication. One major objective of the McCarran Amendment would therefore be satisfied; neither the Tribe nor the United States—behind the cloak of sovereign immunity—could prevent the judicial determination of all claims. It is, indeed, intolerable to permit unquantified Indian water rights indefinitely to cast a shadow over competing diversion claims simply because neither the United States nor the Tribe is ready or willing to submit the matter to adjudication in any forum. Accordingly, it seems right to say to the United States and the Tribe: Either of you may obtain a determination of Reservation water rights in the federal forum, but, if you do not act promptly, those rights must be adjudicated in the State proceeding.

What is more, since the federal forum is uniquely appropriate only for the adjudication of *federal* rights, the

district court should limit the proceedings before it to the determination of Indian water rights, affording all competing claimants full oportunity to contest the Indian claim, but declining to adjudicate the rights of other users. This would avoid duplication and lessen the burden of the federal courts in dealing with matters properly left to State tribunals. In sum, the judgment of the federal court would determine only the Indian right, and that result would be "plugged in" to the comprehensive decree ultimately rendered in the general State court stream adjudication.

Admittedly, when the United States or the affected Tribe timely invokes federal jurisdiction, some "piecemealing" would result. But, it should be pointed out, that is the usual practice even when the State courts perform the task of adjudicating Indian water rights. The reason is simply that reserved Indian rights are of an entirely different character than rights enjoyed by other claimants under the law of first appropriation, the governing principle in the West. In the case of Indian water rights, the relevant inquiry is *not* what quantity of water was put to beneficial use on a given date. Rather, diversion rights appurtenant to an Indian Reservation are, by hypothesis, reserved as of the date the Reservation was established, regardless whether the water was then used, and quantification is premised on the future needs of the Indians, usually measured in terms of irrigable acreage. See *Arizona* v. *California*, 373 U.S. 546, 598-601 (1963). The fact is that the adjudication of Indian water rights requires a separate proceeding, whatever court system undertakes the task, and the bifurcation is not appreciably different if a federal court performs that role.[21] Thus, there is no reason to believe the de-

[21] The point is illustrated by the procedure followed by the Water Master appointed by the Fifth Judicial District Court of Wyoming in *In re: The General Adjudication of All Rights to Use Water in the Big Horn River and All Other Sources, State of Wyoming*, Civil No. 4993. In that case, the Master severed for a separate trial, prior to the general adjudication, the quantification of the rights

termination of Indian Reservation water rights by a federal court need delay or disrupt the general stream adjudication of all other claims in the State proceedings—normally a much more protracted undertaking.[22]

2. Such a resolution of the jurisdictional question, it seems to us, implements the long tradition of preferring a federal court for the vindication of Indian rights created or protected by federal law.

After all, it has been the rule for two centuries that State authority presumptively does not embrace tribal property or tribal affairs. The immunity of the Tribes from State jurisdiction, insulated by their own residual sovereignty and the protective umbrella of exclusive federal authority, has always been the starting premise. See, *e.g.*, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866); *United States* v. *Kagama*, *supra*, 118 U.S. at 384; *Rice* v. *Olson*, 324 U.S. 786, 789 (1945); *Williams* v. *Lee*, 385 U.S. 217, 219-220 (1959); *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 174-175; *Bryan* v. *Itasca County*, 426 U.S. 373, 381 (1976); *Ramah Navajo School Board* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982), slip. op. 4-6. That principle is reflected in a century of Indian treaties[23] and a host of

---

reserved for the Wind River Indian Reservation. The decision of that matter—not yet issued—will be "plugged in" when the comprehensive decree is ultimately entered. Obviously, that task could have been performed, with no greater disruption, by a federal court or a Master appointed by such a court (perhaps, even, the same Water Master acting for the State court).

[22] Indeed, that appears to be the view of the Montana Supreme Court which, in denying our motion to delay the State adjudication, observed that "[t]he pendency of federal litigation does not affect the State of Montana in proceeding to adjudicate non-Indian claims." 81-2188 Pet. App. 143-144.

[23] Noticing only treaties affecting the Tribes now before the Court, we find a provision expressly confirming "the exclusive jurisdiction" of the United States in the Treaty with the Navajos of Sept. 9, 1849, Art. I, 9 Stat. 974, and a like stipulation acknowledging that the Tribe is "exclusively under the laws, jurisdiction,

statutes, from the first Nointercourse Act of 1790, ch. 33, 1 Stat. 137 through the "disclaimer" provisions of Enabling Acts from 1889 onwards, to the Indian Self-Determination Act of 1975, 25 U.S.C. 450 *et seq.* One would expect this immunity to encompass Reservation water rights, the most vital property interest of the Western Tribes.

To be sure, from time to time, in discrete contexts, Congress has ceded its jurisdiction to the State. But, in each instance, an explicit and unambiguous transfer has been deemed necessary. See *Williams* v. *Lee*, *supra*, 358 U.S. at 220-221; *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 175, 177; *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 381. Here, we cannot ignore that only a year after enactment of the McCarran Amendment, the Congress, in its most "assimilative" period, explicitly *withheld* jurisdiction over Indian water rights when otherwise ceding authority to the States. 25 U.S.C. 1322(b); 28 U.S.C. 1360(b). If we are to reconcile this specific declaration of Congressional policy with a holding that the McCarran Amendment granted concurrent jurisdiction to State courts to adjudicate Indian Reservation water rights, it seems right to treat the federal court as remaining the *preferred* forum, when its jurisdiction is timely invoked.

It is no disparagement of State courts to recognize that they are less familiar with questions of federal Indian law and therefore less equipped accurately to apply the very unique principles of this specialty. See *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 676, 678-682 (1974); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 673-674 (1979). And see *Ramah Navajo School Board* v. *Bureau of Revenue*, *supra*, slip op. 14. At all events, the Court has repeatedly held that when the State lacks authority over Indian affairs, its courts are

---

and government of the United States" in the Treaty with the Apaches of July 1, 1852, Art. 1, 10 Stat. 979. See, also, Treaty with the Cheyenne and Arapahoe of Oct. 28, 1867, Art. VI, 15 Stat. 593, 595; Treaty with the Northern Cheyenne and Northern Arapahoe of May 10, 1868, Art. III, 15 Stat. 655, 656.

likewise disabled. *E.g.*, *Williams* v. *Lee*, *supra*; *Kennerly* v. *District Court of Montana*, *supra*; *Fisher* v. *District Court*, *supra*. See, also, *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 178-179 & n.19. Cf. *Minnesota* v. *United States*, *supra*.[24] Even if there is no such absolute obstacle here, it seems extreme to read the McCarran Amendment as wholly reversing the strong tradition in favor of federal jurisdiction to determine Indian rights.

3. There is, moreover, a further problem, noted but left unresolved in *Akin*. That is the circumstance that, in several of the present cases, the Tribe—rather than the United States—invoked the federal forum. See 424 U.S. at 820 n.26; *id.* at 827 (Stevens, J., dissenting).

To be sure, it was once usual for Indian Tribes to be viewed as incompetent "wards" of the National Government, on whose behalf the United States appeared as "guardian" to assert or defend tribal property rights in its own name. See, *e.g.*, *United States* v. *Rickert*, 188 U.S. 432 (1903); *Heckman* v. *United States*, 224 U.S. 413 (1912). But, increasingly since the passage of the Indian Reorganization Act in 1934, 25 U.S.C. 461 *et seq.*, Tribes have become involved in administering their own property and vindicating their rights through their own attorneys. This trend was given important Congressional endorsement in 1966 by the addition of Section 1362 to the Judicial Code. As a result, Indian Tribes today are fully authorized to prosecute their own claims judicially and commonly do so, especially when the United States—whether because embarrassed by conflicting interests or for other reasons—declines to take the initiative. See *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 472-475 (1976). What is more, the Congress of 1966 quite deliberately opened the *federal* courts to tribal claims be-

[24] In the *Minnesota* case, the Court held that the tradition of exclusive federal jurisdiction over Indian property barred a State court from entertaining a condemnation action with respect to an Indian allotment even though the relevant statute (25 U.S.C. 357) authorized condemnation "under the laws of the State." See, also, *United States* v. *Clarke*, 445 U.S. 253, 254 (1980).

cause "[t]he issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts." S. Rep. No. 1507, 89th Cong., 2d Sess. 3 (1966). See, also, H.R. Rep. No. 2040, 89th Cong., 2d Sess. 3 (1966).

Unless it is unavoidable, these rights of self-representation and of unrestricted access to the federal courts, confirmed by Congress in 1966, ought not be vitiated by a construction of the McCarran Amendment that requires Indian water rights to be adjudicated in State courts as against the United States as trustee. Cf. *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 477-479. At least where a Tribe has exercised its privilege of invoking the jurisdiction of the federal court in its own name, it seems contradictory to require dismissal of that suit and to compel the Tribe to submit unwillingly to the presentation of tribal claims by the United States in the State forum. After all, the McCarran Amendment does not waive the sovereign immunity of the Tribe, and—assuming it is free to do so—the Tribe ought not have to sacrifice that defense in order to appear in a court that it eschews. See *Final Report of the National Water Commission* 478-479 (1973).

The solution, we submit, is not to make the result turn upon whether the United States or the Tribe invokes federal jurisdiction. In our view, Justice Stevens was right in suggesting that this anomaly argues for a rule that requires federal courts to adjudicate Indian Reservation water rights when their jurisdiction is timely invoked, whether by the Tribe or the United States. See 424 U.S. at 827. This is consistent with the majority view in *Akin* that among "the opposing factors" to be taken into account is the adequacy of a state versus federal forum "to resolve the federal claims." *Id.* at 820. Since under the rule we urge the *only* issue to be decided by the federal court in these cases will be the tribal right,[25]

[25] In the Montana cases, this will require the United States to amend its pleadings to eliminate all non-Indian claims from the federal court adjudication.

the appropriateness of the federal forum is readily apparent.

4. Applying the principles just articulated to the cases before the Court, the result is that the judgments of the court of appeals should be affirmed, with some modifications in two instances. In no case have State proceedings reached a point where it would be wasteful or disruptive to allow a federal court to quantify Indian water rights. The only relevant inquiry, then, is whether the jurisdiction of the federal court has been appropriately and timely invoked.

a. In the Montana cases, the subject of the petition in No. 81-2188, there can be little question on that score. Three of the actions were initiated in federal court in 1975, four years before the comprehensive Montana water plan was enacted, and, in the words of the court of appeals (81-2188 Pet. App. 41), "the district courts stayed proceedings, apparently awaiting the state legislation." Even the remaining actions were filed before the new Montana statute took effect and were held in abeyance for more than seven months (*id.* at 27-28). Moreover, although we do not share the view that the United States suffers any disabling "conflict of interest" in representing the Tribal water claims (see *id.* at 43-44, 52), it is relevant that the Indian Tribes are parties (or seeking to intervene) in most of the cases, anxious to assert their own claims through attorneys of their choosing, and have invoked the federal court's jurisdiction under 28 U.S.C. 1362 to that end (*id.* at 44-45).

In these circumstances, we think it clear that the court of appeals was right in holding that the federal court should have retained jurisdiction. To be sure, in our view, the district court ought confine itself to quantifying the Indian water rights, without otherwise interfering with the State stream adjudication proceedings. But we do not read the judgment of the court of appeals as barring that accommodation. At all events, as has been

noted,[26] we would undertake to amend our complaint accordingly.

b. The Arizona cases involved in No. 81-2147 present a somewhat more complex procedural history. Although four separate proceedings before the State Land Department to determine rights on the Salt, Verde, Gila and Little Colorado Rivers were filed between 1974 and 1978, no service of process was attempted in any of these cases until early 1979, and service has not yet occurred in two instances. Each of the six Indian Tribes involved invoked the jurisdiction of the federal court in the Spring of 1979, seeking various relief. Only thereafter did Arizona enact legislation to transfer the task of determining water rights from the Land Department to the State courts, and not until late 1981 did the Arizona Supreme Court consolidate the proceedings relating to the Gila River and its major tributaries, the Salt and Verde Rivers. See 81-2147 Pet. 7-8. To this date, no evidentiary proceedings of any kind have occurred in the State courts, and all further action has been suspended pending this Court's ruling. 81-2147 Pet. App. G-1, H-1.

In this posture of the cases, we believe the district court should have assumed jurisdiction to quantify the Indian Reservation water claims. In at least three instances, the Tribe expressly sought such a limited adjudication by the federal court. In the remaining cases, it appears that the Tribe was not asking for a quantification of its rights and, in our view, such a prayer must be made if adjudication by the State court is to be avoided. But, in the present situation, that request would not be untimely. Accordingly, we believe the judgments of reversal in the Arizona cases should be affirmed, with a modified direction on remand.[27]

---

[26] See note 25, *supra*.

[27] As we have indicated (see note 15, *supra*), we cannot endorse the instruction to determine whether Arizona has effectively overriden the disclaimer impediment. But the district court should be directed to surrender its jurisdiction as to any Indian Reservation water rights which neither the Tribe nor the United States submits to adjudication in that court within a reasonable time after this Court announces its decision.

CONCLUSION

The petitions for writs of certiorari in both Nos. 81-2147 and 81-2188 should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

DIRK D. SNEL
THOMAS H. PACHECO
Attorneys

AUGUST 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 385070 1073